Rules 9 and 19, Ariz. R. Crim. P.: While defendant has a right to be present at trial, he has no "right to be absent"…….Revised 2/2010

Rule 19.2, Ariz. R. Crim. P., provides that the defendant has a right to be present throughout his trial:

> The defendant has the right to be present at every stage of the trial, including the impaneling of the jury, the giving of additional instructions pursuant to Rule 22, and the return of the verdict.

In addition, Rule 9.1, Ariz. R. Crim. P., generally provides that a defendant may waive his right to be present at any proceeding:

> Except as otherwise provided in these rules, a defendant may waive the right to be present at any proceeding by voluntarily absenting himself or herself from it. The court may infer that an absence is voluntary if the defendant had personal notice of the time of the proceeding, the right to be present at it, and a warning that the proceeding would go forward in his or her absence should he or she fail to appear.

However, just because the defendant may waive his right to be present does not mean he has an affirmative right to be absent from any part of his trial. In *State v. Mumford*, 136 Ariz. 465, 666 P.2d 1074 (App. 1982), the defendant requested a *Dessureault*[1] hearing to determine if the in-court identification by the witnesses had been tainted by unduly suggestive pretrial procedures. He requested to be absent during this hearing, saying that he did not want the witnesses' identification to be reinforced by seeing him in the courtroom. The trial court refused to excuse him, and, on appeal, the defendant argued that he had an "absolute right to be absent." *Id.* at 466, 666 P.2d at 1075. The Court of Appeals disagreed, stating that, while the Rules of Criminal Procedure grant a defendant a right to be present and a right to waive his presence, the Rules do not give a defendant any substantive right to be absent from

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[1] *State v. Dessureault,* 104 Ariz. 380, 453 P.2d 951 (1969).

criminal trial proceedings. Citing *People v. Winship*, 309 N.Y. 311, 130 N.E.2d 634 (1955), the Court reasoned that the prosecution has the right to require the defendant's presence at trial for the purpose of having the State's witnesses identify the defendant. Therefore, the trial court need not accept the defendant's proffered waiver of his right to be present. *Mumford*, 136 Ariz. at 467, 666 P.2d at 1076, citing *Winship*, 309 N.Y. at 314, 130 N.E.2d at 635.

Case law from other jurisdictions agrees with *Mumford*, *supra*. In *People v. Frye*, 18 Cal.4th 894, 77 Cal.Rptr.2d 25, 959 P.2d 183 (1998) *overruled on other grounds by People v. Doolin*, 45 Cal.4th 390, 421, fn 22, 198 P.3d 11, 36 (2009), a capital murder case, the defendant did not want to be in the courtroom during the penalty phase. Defense counsel informed the court that he had advised the defendant that it would be in his best interests to be present. Nevertheless, counsel said, the defendant had difficulty maintaining control and "was likely to have a flare-up in front of the jury that would have a deleterious effect on their opinion of him." *Id*. at 1009, 77 Cal.Rptr.2d at 90, 959 P.2d at 248. The defendant also told the trial judge that he was angry and did not want to remain in the courtroom. The judge explained to the defendant the importance of being present and denied the defendant's request to absent himself from the courtroom. *Id*. The defendant eventually had "an angry outburst and a display of resentment" before the jury during the penalty phase of his trial. *Id*. at 1010, 77 Cal.Rptr.2d at 91, 959 P.2d at 249.

On appeal, the defendant in *Frye* claimed that the trial court erred in refusing to grant his request to absent himself from the proceedings. He argued that because he had the right to be present at trial, and also had the right to waive his presence, he had

an affirmative right to be absent. The defendant also asserted that requiring him to be present at the penalty phase of his trial effectively compelled him to be a witness against himself, violating both the state and federal guarantees against compelled self-incrimination.

The California Supreme Court in *Frye* found that there was no affirmative right to be absent from trial, nor any "right of the defendant not to be present or otherwise avoid being confronted with the witnesses against him." *Id*. at 1011, 77 Cal.Rptr.2d at 91, 959 P.2d at 249. Further, the California court held that "it was not the trial court's ruling, but defendant's own actions that led to his asserted outburst at the jury. … [I]t is appropriate to place on the defendant, rather than the court, the burden of conducting himself at trial in a manner which comports with his best interests." *Id*. at 1011, 77 Cal.Rptr.2d at 92, 959 P.2d at 250. The court also found no violation of the guarantee against compelled self-incrimination, noting that "the prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material." *Id*., *quoting Holt v. United States*, 218 U.S. 245, 252-53 (1910).

In *State v. Randle*, 603 N.W.2d 91 (Iowa 1999), the defendant was released on bail pending trial. When he failed to appear on the second day of trial, the trial court found that his absence was voluntary and allowed the trial to proceed in absentia. The defendant was convicted and the State later charged him with failure to appear. The defendant moved to dismiss the failure to appear charge, asserting that "he had an absolute right not to appear at trial." *Id.* at 92. The Iowa Supreme Court disagreed. Citing *State v. Brandt*, 253 N.W.2d 253 (Iowa 1977), "a defendant could not bootstrap a

right to be absent from his trial from a statute which merely gave the trial court the discretion to try him in absentia." The Iowa court also reasoned that "the State was entitled to have the accused present so a witness could look him in the face and identify whether he was the culprit." *Randle*, 603 N.W.2d at 93. However, in *State v. Folkerts*, 703 N.W.2d 761, 766 (Iowa 2005), the court disavowed its holding in *Randle* to the extent that case would "require the defendant to be present at the deposition of an eyewitness when it is likely an impermissibly suggestive identification would take place."

In *Durant v. Commonwealth*, 35 Va.App. 459, 462, 546 S.E.2d 216, 218 (2001), the Virginia Court of Appeals held that the defendant had "no constitutional right to be absent at trial." The Virginia court quoted from *Singer v. United States*, 380 U.S. 24, 36 (1965): "The ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right." Likewise, in *State v. Patterson*, 367 S.C. 219, 230, 625 S.E.2d 239, 245 (2006), the court stated, "Although a criminal defendant has a constitutional right to be present during court proceedings, the defendant has no absolute corresponding right to be absent." *See also Ziebell v. State*, 788 N.E.2d 902, 911 (Ind.App. 2003).